

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996:)	CC Docket No. 96-115
)	
Telecommunications Carriers' Use)	
of Customer Proprietary Network)	
Information and Other Customer)	
Information)	

BELLSOUTH COMMENTS

BellSouth Corporation, on behalf of its affiliated companies ("BellSouth"), submits these Comments in response to the several petitions for reconsideration¹ of the Common Carrier Bureau's May 21, 1998, *Clarification Order* in the above-referenced proceeding.²

The Bureau issued its *Order* to clarify certain aspects of the Commission's *Second Report and Order*³ in this same proceeding. In the *Second Report and Order*, the Commission concluded that carriers are not permitted to use customer proprietary network information ("CPNI") to market CPE or information services, unless a carrier has the customer's affirmative approval to do so. The Commission based its decision on a determination that CPE and

¹ GTE Service Corporation, Petition for Reconsideration (filed July 22, 1998); Vanguard Cellular Systems, Inc., Petition for Reconsideration and Clarification (filed July 22, 1998); Comcast Cellular Communications, Inc., Petition for Reconsideration (filed July 22, 1998).

² *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket 96-115, Order, DA 98-971 (released May 21, 1998) (*Clarification Order*).

³ *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 13 FCC Rcd 8061 (1998) (*Second Report and Order*).

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information services are neither telecommunications services within the customer's total service relationship with a carrier nor services necessary to or used in the provision of telecommunications services. In the *Clarification Order*, however, the Bureau explained that a carrier still may use CPNI without express customer approval to market to a customer a bundled offering of telecommunications service and CPE or information services, but only if the customer originally purchased the CPE or information service from that carrier and only as part of a bundled offering with telecommunications service.

A number of parties have filed petitions for reconsideration of the Commission's underlying decision in the *Second Report and Order* regarding carriers' use of CPNI in marketing CPE and information services. Several, including BellSouth, further demonstrated that the *Clarification Order* provides inadequate relief from the Commission's underlying decision.⁴ Vanguard and Comcast essentially continue to stress that point by attaching and incorporating their respective, previously-filed petitions for reconsideration of the *Second Report and Order* as the bulk of their instant petitions. Although the Bureau cannot fully rectify the errors of the Commission's *Second Report and Order* through clarification, the Bureau can and should modify its *Clarification Order* so that the ill-effects of those errors are less pronounced.

The *Clarification Order*'s failure lies in its attempt to define carriers' rights to use CPNI for marketing bundled packages on the basis of two factors: (1) the customer's original supplier of CPE or information service; and (2) the terms under which the CPE or information service was initially provided by the carrier. As GTE shows in its instant petition and as others have shown previously, these conditions have a particularly pernicious effect on CMRS providers who

⁴ Of course, the failures of the *Clarification Order* to redress the deficiencies of the *Second Report and Order* will be rendered moot if, on reconsideration of the *Second Report and Order*, the Commission revisits its underlying decision.

have greater bundling opportunities than do wireline carriers, although the consequences may equally be suffered by carriers selling services that require specialized CPE, such as Caller ID or Call Waiting Deluxe services.

The requirement that a carrier must have provided the customer's CPE before the carrier can use CPNI (without prior approval) to market a new service package that includes or requires CPE squares neither with carriers' practices of tracking customers' CPE suppliers nor with customers' expectations of the scope of a carrier's service offering. Indeed, as GTE has detailed, most CMRS providers do not track their customers' suppliers of CPE because heretofore that information has not been of much consequence. Because a CMRS carrier must program *any* customer handset so that it will function properly with the carrier's network, the source of the customer's CPE is irrelevant to the customer's service relationship with the carrier. Whether the carrier originally supplied the CPE or not, the CPE is necessary to and used in the provision of the carrier's service.

The Bureau even acknowledges that the carrier need not always be the original supplier of CPE in order to use CPNI to target customers for a new bundled offering. Specifically, the Bureau notes that when a carrier's agent previously has sold a bundled package of CMRS service with CPE or information services, the carrier subsequently may use CPNI to target those customers for new bundled offerings.⁵ But, as this Commission has expressly recognized in the past,⁶ a common practice in the industry is for carriers' agents to market the carriers' services on a commission basis and to create the bundles of service and CPE themselves. In these cases, it is the agent, not the carrier, who sells the initial bundled package. While the Bureau's *Clarification*

⁵ *Clarification Order* at ¶ 4 and n.12.

⁶ *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, 4031 (1992).

Order will allow carriers to continue to use CPNI derived from such initial sales to promote new bundled packages, that the Bureau had to acknowledge the existence of these arrangements at all in the context of subsequent permissible uses of CPNI shows how contorted an outcome may be that is otherwise driven by a rule that generally depends on the CPE supplier's identity.

Another flaw in the Bureau's analysis is that it appears to rest on the fiction that a carrier will rely on CPNI to sell the service component of a new bundled package and separately will rely on prior CPE or information service records to sell the CPE or information service component. This fiction itself appears to be built on the erroneous notion that when carriers sell bundled packages -- particularly those that include specialized CPE that is necessary to make a service work -- the carrier is selling or marketing the components of the package as two discrete products.

The reality is that specialized CPE and information services are often -- and for CMRS, are usually -- associated with a service offering as a promotional device to the customer to buy the service. Indeed, CMRS carriers are primarily interested in selling service subscriptions and airtime (usage). CPE and information service components are merely add-ons to facilitate and promote service procurement and consumption. Thus, for example, CMRS carriers desiring to promote new digital service should be no more precluded from using CPNI to target customers for bundles that may include a new handset than would be a carrier using CPNI to target customers with a service promotion offering sports tickets, toasters, vacation trips, or anything else of value as an inducement to subscribe to the service.⁷ In such promotions, the carrier uses

⁷ Even if the promotion and advertising of a service focuses on the inducement (*e.g.*, "subscribe now and get XYZ handset for \$.01"), the promotion and marketing is of the *service*, not the associated equipment component.

CPNI to market the service package, which includes the inducement, but is not separately marketing the inducement component.

The Bureau should abandon this fiction and conclude that a carrier marketing a service with associated CPE or an information service as an inducement to purchase the service is not deemed to be using CPNI to market the CPE or information service. By adopting this modification, the Bureau can avoid the absurdities and inconsistencies caused by present reliance on the identity of the original CPE or information service supplier, yet still adhere to the Commission's proscription on use of CPNI for marketing CPE and information services as discrete offerings.

CONCLUSION

For the reasons stated herein, BellSouth supports modification of the Bureau's *Clarification Order*, so that, at a minimum, carriers are not prohibited from using CPNI to target customers for bundled or packaged service offerings that include associated CPE or information services, regardless of whether the carrier was the original provider of CPE or an information service to that customer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 26th day of August, 1998, served all parties to this action with a copy of the foregoing BellSouth Comments by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties listed below:

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